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13: 100-13

85-0954/1

Date 3/21/85

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**REMARKS**

#1 - FOR ACTION

(PLS PREPARE DIRECT RESPONSE WITH A DROP CY TO EO/DDA.)

SUSPENDED PREVIOUSLY FOR 29 MARCH 1985, OLL/LD HAVE PROVIDED ADDITIONAL INFORMATION TO ASSIST IN PREPARATION OF RESPONSE. (DDA 85-0954 SENT ORIGINALLY.)

STAT

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85-0954/1

OLL #85-0740/2  
19 March 1985

MEMORANDUM FOR: ✓ Deputy Director for Administration  
General Counsel  
Chairman, SECOM  
Director, Office of Personnel  
Director, Office of Security  
Chief, Administrative Law Div, OGC  
Chief, Intelligence Community Affairs Div, OGC  
Chairman, Publications Review Board  
Associate Legal Advisor, Publications Review Board

FROM:

Legislation Division  
Office of Legislative Liaison

STAT

SUBJECT:

GSA and DoJ Letters on H. R. 39 "Federal  
Polygraph Limitation and Anti-Censorship Act  
of 1984" - Supplementary Material

By memorandum dated 15 March 1985 (OLL 85-0740/1), this office requested your comments on the draft Department of Justice and General Services Administration's views letters on H.R. 39, the "Federal Polygraph Limitation and Anti-Censorship Act of 1984". In order to assist you in preparing your comments, I have attached copies of the bill itself, as well as the floor statement of Representative Brooks upon its introduction. You may recall that these materials were sent out earlier in connection with the solicitation of comments on the bill itself.

STAT

Attachments:  
As stated

99TH CONGRESS  
1ST SESSION

# H. R. 39

Relating to the administration of polygraph examinations and prepublication review requirements by Federal agencies.

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## IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 1985

Mr. BROOKS introduced the following bill; which was referred to the Committee on Post Office and Civil Service

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## A BILL

Relating to the administration of polygraph examinations and prepublication review requirements by Federal agencies.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That this Act may be cited as the "Federal Polygraph Limi-  
4       tation and Anti-Censorship Act of 1984".

5       SEC. 2. (a) Chapter 73 of title 5, United States Code, is  
6       amended by adding at the end thereof the following new  
7       subchapter:

1 "SUBCHAPTER VI—POLYGRAPH EXAMINATION  
2 AND PREPUBLICATION REVIEW RESTRIC-  
3 TIONS

4 "§ 7361. Definitions

5 "For purposes of this subchapter—

6 "(1) the term 'agency' means—

7 "(A) an Executive agency;

8 "(B) the United States Postal Service;

9 "(C) the Postal Rate Commission;

10 "(D) the Administrative Office of the United  
11 States Courts;

12 "(E) the Library of Congress;

13 "(F) the Government Printing Office;

14 "(G) the Office of Technology Assessment;

15 "(H) the Congressional Budget Office;

16 "(I) the Office of the Architect of the Cap-  
17 itol; and

18 "(J) the Botanic Garden;

19 "(2) the term 'employee' means—

20 "(A) an individual employed by an agency;

21 "(B) a Congressional employee (other than  
22 an individual under subparagraph (A)); and

23 "(C) an expert or consultant who is under  
24 contract under section 3109 of this title with an  
25 agency, including, in the case of an organization

1 performing services under such section, an  
2 individual involved in the performance of such  
3 services;

4 “(3) the term ‘classified information’ means  
5 information—

6 “(A) specifically authorized under criteria es-  
7 tablished by statute or Executive order to be kept  
8 secret in the interest of national defense or foreign  
9 policy; and

10 “(B) in fact properly classified pursuant to  
11 such statute or Executive order;

12 “(4) the term ‘polygraph examination’ means an  
13 interview with an individual which involves the use of  
14 a device designed to permit the examiner to make an  
15 inference or a determination, by evaluation of meas-  
16 ured physiological responses, concerning whether the  
17 individual has truthfully or deceptively responded to  
18 inquiries made in such interview;

19 “(5) the term ‘action’, as used with respect to an  
20 employee or applicant for employment, means—

21 “(A) a personnel action under clauses (i)  
22 through (x) of section 2302(a)(2)(A) of this title;

23 “(B) a decision concerning clearance for  
24 access to classified information; and

1                   “(C) a performance evaluation (other than  
2                   under chapter 43 of this title);

3                   in the case of such employee or applicant; and

4                   “(6) the term ‘prepublication review’ means sub-  
5                   mission of information to an agency for the purpose of  
6                   permitting such agency to examine, alter, excise, or  
7                   otherwise edit or censor such information before it is  
8                   publicly disclosed, but does not include any such sub-  
9                   mission with respect to information which is to be dis-  
10                  closed by an employee in such employee’s official  
11                  capacity.

12   **“§ 7362. Restrictions relating to polygraph examinations**

13                  “(a) An agency may not—

14                  “(1) require, threaten to require, or, except as  
15                  provided in subsection (b), request any employee or  
16                  applicant for employment to submit to a polygraph  
17                  examination;

18                  “(2) take, or threaten to take, any action against  
19                  an employee or applicant for employment—

20                  “(A) on the basis of that individual’s refusal  
21                  to submit to a polygraph examination; or

22                  “(B) on the basis of any inference or deter-  
23                  mination (referred to in section 7361(4) of this  
24                  title) made from that individual’s performance in  
25                  the course of a polygraph examination; or

1           “(3) fail to take, or threaten to fail to take, any  
2           action on behalf of an employee or applicant for  
3           employment—

4                   “(A) on the basis of that individual’s refusal  
5                   to submit to a polygraph examination; or

6                   “(B) on the basis of any inference or deter-  
7                   mination described in paragraph (2)(B).

8           “(b) An agency may request an employee, in writing, to  
9           submit voluntarily to a polygraph examination—

10                   “(A) if the examination is administered as part of  
11                   a specific investigation into alleged criminal conduct—

12                           “(i) after the completion, by other means, of  
13                           as thorough an investigation as circumstances  
14                           reasonably permit; and

15                           “(ii) solely for the development of informa-  
16                           tion essential to that investigation;

17                   “(B) if the individual is reasonably believed to  
18                   have knowledge of the matter under investigation; and

19                   “(C) if the alleged criminal conduct constitutes an  
20                   offense punishable by death or imprisonment for a term  
21                   exceeding one year.

22   **“§ 7363. Restrictions relating to prepublication review**

23           “An agency may not—

24                   “(1) request, require, or threaten to require, an  
25                   employee or applicant for employment to enter into an

1 agreement, any part of which requires prepublication  
2 review;

3 “(2) take, or threaten to take, any action against  
4 an employee or applicant for employment on the basis  
5 of that individual's refusal to enter into such an  
6 agreement;

7 “(3) take, or threaten to take, any action against  
8 an employee or applicant for employment on the basis  
9 of that individual's refusal to comply with any of the  
10 provisions of such an agreement which require pre-  
11 publication review;

12 “(4) fail to take, or threaten to fail to take, any  
13 action on behalf of an employee or applicant for em-  
14 ployment on the basis of a refusal referred to in  
15 paragraph (2) or (3); or

16 “(5) establish or enforce, or threaten to establish  
17 or enforce, any other requirement in order to compel  
18 prepublication review.

19 **“§ 7364. Remedies**

20 “(a)(1) Subject to paragraph (2) and subsection (b), any  
21 person aggrieved by a violation of section 7362 or 7363 of  
22 this title may bring a civil action against the United States  
23 for equitable or monetary relief, or both, in the district court  
24 of the United States for the district in which that person  
25 resides, for the District of Columbia, or, in the case of an



1 employee or former employee, for the district in which that  
2 person was employed at the time the cause of action arose.

3 “(2) A civil action under this subsection shall be forever  
4 barred unless commenced within two years after the cause of  
5 action arose. For purposes of this paragraph, a cause of  
6 action shall be deemed to have arisen on the date that the  
7 person aggrieved knew, or with reasonable diligence should  
8 have known, of the violation concerned.

9 “(3) The court shall award reasonable costs of litigation,  
10 and may award reasonable attorney fees, to a prevailing  
11 plaintiff in an action brought under this subsection.

12 “(b)(1) If a person aggrieved by a violation of section  
13 7362 or 7363 of this title would also be entitled to initiate  
14 proceedings for remedial action under agency administrative  
15 procedures, such person may raise the matter under subsec-  
16 tion (a) or under such administrative procedures, but not  
17 both.

18 “(2) A person shall be deemed to have exercised the  
19 option under this subsection to raise a matter either under  
20 subsection (a) or under agency administrative procedures  
21 upon the timely commencement of an action by such person  
22 in accordance with the Federal Rules of Civil Procedure or  
23 the timely initiation of such administrative procedures by  
24 such person, as the case may be.

1       “(3) For purposes of this subsection, the term ‘agency  
2 administrative procedures’ means any formal process of  
3 review by an agency provided under statute, regulation, or  
4 Executive order, including judicial review of any determina-  
5 tion made in the course of such process.

6       **“§ 7365. Exemptions**

7       “Sections 7362 and 7363 of this title do not apply—

8               “(1) to the Central Intelligence Agency, in the  
9 case of any individual employed by, or detailed to, the  
10 Central Intelligence Agency, any individual applying  
11 for a position in the Central Intelligence Agency, or  
12 any expert or consultant under contract with the  
13 Central Intelligence Agency; or

14               “(2) to the National Security Agency, in the case  
15 of any individual employed by, or detailed to, the Na-  
16 tional Security Agency, any individual applying for a  
17 position in the National Security Agency, or any  
18 expert or consultant under contract with the National  
19 Security Agency.”.

20       (b) The analysis for chapter 73 of title 5, United States  
21 Code, is amended by adding at the end thereof the following:

              “SUBCHAPTER VI—POLYGRAPH EXAMINATION AND  
              PREPUBLICATION REVIEW RESTRICTIONS

              “7361. Definitions.

              “7362. Restrictions relating to polygraph examinations.

              “7363. Restrictions relating to prepublication review.

              “7364. Remedies.

              “7365. Exemptions.”.

1       SEC. 3. (a)(1) The provisions of any agreement referred  
2 to in section 7363(1) of title 5, United States Code (as added  
3 by this Act) are, to the extent that such provisions relate to  
4 prepublication review, hereby rescinded.

5       (2) The head of each agency concerned shall provide  
6 written notice to each individual who, immediately before this  
7 Act takes effect, was a party to any such agreement, inform-  
8 ing such individual of—

9               (A) the enactment of this section; and

10              (B) the provisions of the agreement rescinded as a  
11 result of the enactment of this section.

12       (b) Nothing in subsection (a) applies with respect to the  
13 Central Intelligence Agency or the National Security  
14 Agency, or to any agreement which requires prepublication  
15 review by either of those agencies. •

16       (c) For purposes of this section, “prepublication review”  
17 and “agency” each has the meaning given that term in sec-  
18 tion 7361 of title 5, United States Code (as added by this  
19 Act).

20       SEC. 4. This Act shall take effect on April 15, 1984.

○

otherwise. Local commanders cannot invent money when housing allowances are not adequate, and they cannot provide information and assistance, except on an ad hoc basis. They can do nothing about the need for placing dental care under CHAMPUS.

My bill addresses these concerns. It speaks to the need for a comprehensive effort to assist military families. The need is great, and is a matter of urgent concern for the 99th Congress.

□ 1850

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Georgia [Mr. GINGRICH] is recognized for 60 minutes.

[Mr. GINGRICH addressed the House. His remarks will appear hereafter in the Extensions of Remarks.]

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from California [Mr. HUNTER] is recognized for 60 minutes.

[Mr. HUNTER addressed the House. His remarks will appear hereafter in the Extensions of Remarks.]

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Florida [Mr. MACK] is recognized for 60 minutes.

[Mr. MACK addressed the House. His remarks will appear hereafter in the Extensions of Remarks.]

#### INTRODUCTION OF BILL TO RAISE THE OMB DIRECTOR TO CABINET STATUS

(Mr. BROOKS asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

● Mr. BROOKS. Mr. Speaker, today I am offering legislation which would raise the executive level ranking of the Director of the Office of Management and Budget to that of the members of the President's Cabinet. If the first term of the Reagan administration has taught us anything, it is the power and vital position the OMB Director holds in shaping the direction and policy of the executive branch. Yet, in the bureaucratic framework, the OMB Director is one notch below the members of the Cabinet whose budgets and management practices he oversees.

Congress has recognized the importance of the position of OMB Director by requiring that his nomination be subject to confirmation by the Senate. We should take the additional step of compensating the Director at the level of Cabinet Secretaries and his deputy at the level of deputy Cabinet officers.

Mr. Speaker, as I have noted in introducing this bill in previous Congresses, my interest is institutional rather than personal. Whether the individual holding the office of OMB Director is James Lynn in the Ford administration, or James McIntyre in

the Carter administration, or David Stockman in the Reagan administration, it is the office of OMB Director and the responsibilities exercised by that office that call for the Director to be compensated at the level of a Cabinet officer. I hope this bill will be approved promptly by the 99th Congress.●

#### CONSTITUTIONAL AMENDMENT PROVIDING FOR DIRECT ELECTION OF THE PRESIDENT

(Mr. BROOKS asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

● Mr. BROOKS. Mr. Speaker, the electoral college is an anachronistic and potentially dangerous vestige of another time in our history. It makes the two elected officials who govern over all the people, the President and Vice President, subject to a cumbersome process that in some circumstances could thwart the will of the people. It is time for us to abolish the electoral college and provide for the direct election of the President by the voters. I am introducing a constitutional amendment today which will accomplish this goal.

Direct election is the method by which all of our other elected public officials in this democracy are chosen. It is the only process that is completely consistent with the ideals of democracy that we as a nation believe in and have fought to uphold for nearly 200 years.

The cumbersome and anti-democratic process of the electoral college runs counter to this current of history. While in other areas, such as the extension of the right to vote, we have expanded our democracy, the electoral college remains as a relic of an era that bore an underlying suspicion for the will of the people.

My amendment will provide that a candidate receiving at least 40 percent of the popular vote would be elected. If no candidate got 40 percent, my proposal would provide for a runoff election between the highest two finishers.

Mr. Speaker, I hope that the 99th Congress will seriously consider the dangers posed by the electoral college and give the people a true voice in electing the President by approving my amendment.●

#### LAW ENFORCEMENT PROTECTION ACT OF 1985

(Mr. BROOKS asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

● Mr. BROOKS. Mr. Speaker, I am today introducing legislation to ban cop-killer, armor-piercing bullets. The Law Enforcement Protection Act of 1985 is identical to legislation I proposed in the last Congress. As my colleagues may recall, that bill enjoyed

the broad and bipartisan support of over 200 cosponsors, the administration, and many police and sporting groups. Unfortunately, in the closing rush of the last Congress this important legislation was not acted upon.

It is the aim of my bill to ensure the continued utility of the lifesaving soft body armor vests worn by many of our Nation's police officers in their dangerous work by deterring the availability and use of ammunition designed to penetrate armor. At the same time, the bill does not unreasonably impact on the legitimate interests of America's sporting and hunting community.

This legislation would regulate the manufacture and importation of ammunition which is designed as armor piercing. It amends title 18 of the United States Code to prohibit the manufacture and importation of armor-piercing ammunition except for law enforcement, military, or export purposes. The manufacture or importation for these permissible uses would be regulated through the licensing and the provisions of the Gun Control Act of 1968.

In addition, a mandatory 5-year minimum prison sentence for the possession or use of armor-piercing ammunition during the commission of a violent felony is added to ensure stiff punishment for the criminal who resorts to its use.

This legislation, which reflects the results of many months of hard work by the various affected parties, is the best means for responsibly controlling armor-piercing ammunition and providing protection to our police officers.●

#### FEDERAL POLYGRAPH LIMITATION AND ANTI-CENSORSHIP ACT OF 1985

(Mr. BROOKS asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

● Mr. BROOKS. Mr. Speaker, today I am introducing the Federal Polygraph Limitation and Anti-Censorship Act of 1985. This bill is essentially the same as legislation I proposed during the last session of Congress. That bill was extensively reviewed by several committees of the House during the last Congress, but was not addressed by the full House in the press of business at the close of the last session.

I expect that many of my colleagues are familiar with the bill and its history. The circumstances that gave rise to this legislation and the events of the last Congress are critical, though, to a complete understanding of the need for and purposes of this legislation. At the risk of being unduly repetitious, I think it is important, therefore, to lay out that background with some detail.

This bill is based upon the findings and recommendations of the Government Operations Committee, which reviewed the censorship and poly-

January 3, 1985

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graph initiatives of the Reagan administration in October 1983.

Specifically, the committee recommended against the implementation of the prepublication censorship and polygraph provisions of Presidential National Security Decision Directive 84. These provisions would have mandated the signing of life long prepublication censorship contracts by over 100,000 Government employees and the coerced use of polygraph exams for all employees in the course of leak investigations. The committee also recommended against the implementation of broader, but parallel, polygraph policies which would have expanded the coerced use of polygraph tests to preemployment screening, preaccess interviews, and random security checking.

In a bipartisan report, the Government Operations Committee concluded that the prepublication censorship contracts would entail unwarranted prior restraints in violation of the first amendment. This program, as with any Government censorship of speech, has a tremendous potential for political abuse. Such a system has many harmful consequences, even when implemented and carried out with the most noble of intentions. Quite simply, this censorship system directly undermines a pillar of America's political system—the freedom from prior governmental restraint in matters of political discourse. My bill would prohibit this censorship policy.

The Government Operations Committee also concluded that there is no scientifically acceptable evidence to support the polygraph policies proposed and good reason to believe they will result in high error rates causing harm to many innocent people, our Government, and national security. For its review, the Government Operations Committee requested the Congress' Office of Technology Assessment to study the available scientific literature on polygraph testing and advise the Congress on its validity. The OTA concluded that there was no scientifically acceptable evidence to support the use of widespread polygraph screening as proposed.

In the context of narrow specific incident investigations—generally criminal—the OTA found conflicting scientific conclusions on polygraph validity. In 28 studies presenting "acceptable scientific criteria," correct guilty detections were found to be as low as 35 percent and correct innocent detections as low as 12.5 percent. A coin toss could be more accurate.

Further, OTA found that in any context—narrow criminal investigations or widespread screening—coercing persons to take a polygraph test would likely decrease any validity the test may have. Because there is no physiological response unique to lying, the polygraph cannot distinguish between people who are lying and those who are merely afraid or nervous. Coercing employees to submit to polygraph

tests increases the likelihood of inaccurate conclusions.

OTA also indicated that there are serious questions regarding the polygraph test's susceptibility to countermeasures. As a result, use of the polygraph may create a false sense of security and weaken our national defense. Moles are often good liars.

This legislation would prohibit the screening use of polygraph testing and would place tight controls on its use in specific incident investigations, one of which is that the test be truly voluntary.

Last February, as the previous bill was proceeding to markup, the White House announced that it was suspending, temporarily, the polygraph and censorship portions of NSDD 84. As it turns out, however, this suspension has had little effect on the actual implementation of these administration initiatives. The GAO, in a new investigation requested by myself and Chairman Ford of the Post Office and Civil Committee, has concluded that right now all the major agencies, including DOD, State, Agriculture, Commerce, Justice, Energy, Treasury, and Transportation are requiring certain employees to sign lifelong prepublication review contracts.

These contracts are virtually identical to those which had been suspended by the President. At the DOD, alone, GAO, in June of 1984, found that since 1981, over 156,000 employees have already signed these lifelong censorship contracts.

The GAO report demonstrates that the President's suspension of the polygraph provision of NSDD 84 has not affected the administration's plans for screening with polygraphs either. Currently, the Department of Defense intends to institute a coerced polygraph screening program which will cover over 100,000 Department employees. The Department of Defense intends to hire 50 new polygraph operators to enable it to conduct 10,000 new screening exams annually. Other agencies are also following suit. For instance, the Justice Department intends to widen its polygraph screening program, and the Federal Emergency management Agency has drawn up a polygraph screening program to be implemented for the first time at that agency.

It is incumbent, therefore, that this legislation be expeditiously considered and passed by the Congress to undo, and prevent further reincarnations of, these dangerous censorship and polygraph policies. ●

#### CONSTITUTIONAL AMENDMENT FOR A SIX-YEAR TERM FOR THE PRESIDENT

(Mr. BROOKS asked and was given permission to extend his remarks at this point in the Record and to include extraneous matter.)

● Mr. BROOKS. Mr. Speaker, today I am introducing a joint resolution pro-

posing a constitutional amendment which would provide single 6-year terms for the President and Vice President. This is a proposal which I have offered for the past several Congresses, but its origins go back nearly 200 years to the Constitutional Convention. While the Founding Fathers decided to provide for 4-year Presidential terms, the concept for a single 6-year term of office for our Chief Executive is one which merits further consideration at this time.

The pressures of modern political circumstances have turned a President's first 4 years into a virtual continuous reelection campaign. No sooner is the President elected, than he must focus on his next election. While the current Chief Executive had a relatively easy time in securing renomination and reelection, his experience has been the exception rather than the rule. Indeed, both of his predecessors faced grueling and time-consuming contests for their party's nomination, as well as intense and ultimately losing battles for reelection.

Nobody can calculate the price that the country has paid for the distraction that renomination and reelection imposes on a President. Given the stresses and complexities of the office of President, it is vital that we make this office as effective as possible and remove those forces that work against effective Presidential operation. We will all benefit if the occupant of the Oval Office is free to concentrate on the job we elected him to do—running the country—instead of running for a second 4-year term.

Mr. Speaker, a single 6-year term will give our Presidents the time they need to carry out their programs. Limiting them to a single 6-year term will allow them to focus on the job of President instead of the role of candidate.

I hope that the 99th Congress will give serious attention to this proposal. ●

#### SPECIAL ORDERS GRANTED

By unanimous consent, permission to address the House, following the legislative program and any special orders heretofore entered, was granted to:

(The following Members (at the request of Mr. McKERNAN) to revise and extend their remarks and include extraneous material:)

Mrs. SMITH of Nebraska, for 5 minutes, today.

Mr. WEBER, for 60 minutes, today.

Mr. WALKER, for 60 minutes, today.

Mr. GINGRICH, for 60 minutes, today.

Mr. HUNTER, for 60 minutes, today.

Mr. MACK, for 60 minutes, today.

(The following Members (at the request of Mr. GONZALEZ) to revise and extend their remarks and include extraneous material:)

Mr. St GERMAIN, for 5 minutes, today.